BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RAYMOND W. HACKETT
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-79
Case No. T-68-60

Employer Account No.

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The petitioner appealed from Referee's Decision No. SF-T-2859 which denied his petition for review filed under the provisions of Unemployment Insurance Code section 1035. The petition was filed to obtain review of the Department's denial of the petitioner's protest of certain benefit charges made to the petitioner's reserve account during the year prior to the computation date of June 30, 1967. The charges in the amount of $370 resulted from payments made to a benefit claimant, L. Callet, Social Security Account No.

STATEMENT OF FACTS

The claimant, Callet, established an unemployment insurance benefit claim effective March 20, 1966. At that time the petitioner was not the last employer by whom the claimant had been employed. Accordingly, the Department did not notify the petitioner at that time of the filing of the claim.

The Department's computation of the claim disclosed that the petitioner had been an employer of the claimant during the base period of the claim. Accordingly, on April 14, 1966, the Department mailed a notice of the filing of the claim to the petitioner. This notice was given to him in conjunction with the Department's notice to him of the computation of the claim under Unemployment Insurance Code section 1329.

Subsequently, the Department recomputed the claim, and on June 20, 1966 it notified the petitioner of its recomputation. Shortly after this, the Department received certain information from the petitioner in regard to the claimant, the exact nature of which is not reflected in the evidence presented at the referee's hearing. An indication of its character, however, is found in the fact that the pleadings are in agreement that information was furnished in regard to the cause of termination of the claimant's employment by the petitioner.

There is no indication in the record that the petitioner ever submitted any information to the Department in response to either notice pertaining to any facts which might affect the claimant's eligibility for benefits. Likewise, there is no indication in the record that the Department ever notified the petitioner of any determination of the claimant's eligibility for benefits. The only departmental action which the record reflects as having been taken in response to the petitioner's submission of information was the Department's mailing of notice to the petitioner that he was not entitled to a ruling on this termination and that his reserve account would be subject to charges because he had not submitted his information within 15 days after he was first notified of the filing of the claim.

In an appeal promptly taken from this denial of a ruling, the petitioner contended that he had never received the first notice which the Department had mailed to him on April 14, 1966. This contention, however, was never resolved because the ruling denial appeal was dismissed on August 11, 1967 after the petitioner did not appear at a scheduled referee's hearing. Apparently the petitioner has now abandoned this contention, because at the referee's hearing in these proceedings he was asked about the receipt of this notice and testified as follows:

> "Q Did you get the Notice of Claim Filed then, Mr. Hackett?
>
> "A I believe it was there. I don't have a record of that, but I am certain it did come, because we find very little fault from notices of the office from Sacramento."

Rather, the petitioner's contention now appears to be that he responded to the Department's notice of April 14, 1966. At the referee's hearing in the present proceedings, the petitioner was asked about this and responded in the following way:

"Q Did you reply to that notice?

"A I did and protested."

Shortly thereafter, however, the petitioner expressed his lack of real knowledge about these details when he was asked the following:

"Q The Department's records indicate that the Department mailed to you as a base period employer, a Notice of Claim Filed and the Computation of Benefit Amounts. However, they have no record of your submitting any written information in response to this claim notice.

"A Yes. It's entirely possible. This is one facet of my business that Mrs. Hackett handles almost exclusively. I am not as conversant on this as I should be."

In regular course, the petitioner's account was charged with its proportionate share of the benefits paid to the claimant, Callet, on or before the computation date of June 30, 1967. These charges in the amount of $370 appeared on a statement of charges to the petitioner's account which was mailed to the petitioner around November 1, 1967. The petitioner now protests these charges on four grounds:

1. That the petitioner never received the referee's decision dismissing his ruling denial appeal on August 11, 1967;

2. That the claimant left the petitioner's employ voluntarily without good cause;

3. That the petitioner had work available for the claimant at all times which the claimant chose not to accept; and

4. That union records can be checked to verify whether the claimant was among several musicians who have been collecting or trying to collect benefits on the petitioner's account while working for others who did not report their wages.

With respect to the dismissal of the petitioner's ruling denial appeal on August 11, 1967, the referee in the present proceedings pointed out to the petitioner that:

> ". . . Twice this matter was set for hearing. The first time, there was a nonappearance and request to reopen. Again, it was reopened and then a nonappearance. No further action was taken by you in respect to that matter."

To this the petitioner responded and the testimony continued as follows:

"A I am very sorry. We generally don't operate on that basis. I must apologize because it's just that I've perhaps been too busy at times and details may slip by. Sometimes our offices are extremely busy.

"Q There is no need for an apology, Mr. Hackett. However, the Department's contention is that you failed to appear at these prior hearings when you were adequately and properly notified.

"A I am certainly prepared to accept that, Mrs. Devine. I think that perhaps our position is wilfully /sic/ weak in this instance. . . ."

At a later point, the referee asked and the petitioner testified:

"Q So far as you know, were all of these notices which the Department alleges were sent to you, received, Mr. Hackett?

"A I am sure they must have been. As I say, we have found very little fault. I occasionally find mail either being lost or not delivered and what not. I don't ever recall having established a claim that we did not receive this."

With respect to the termination of the claimant's work for the petitioner, and in regard to the work which the petitioner had available for the claimant, the only evidence presented was the petitioner's testimony that the claimant:

". . . left my employment without any notice of termination or anything else which was perfectly all right because he represented to me that he had a chance to pick up three or four months steady employment; that he would be back in this market when this protected contract was completed. I never heard another word from Callet until the time he applied and appealed for unemployment compensation."

With respect to the musicians who, according to the petitioner, might be falsely trying to collect benefits on his account, the petitioner testified that:

". . . In two or three situations, we ran into a thing last year in which there seemed to be fraud perpetrated among some operators at Lake Tahoe. I reported it to the fraud people in Sacramento. They came to see me. They said they had uncovered a tremendous abuse. The final disposition on this I haven't heard. There seem to be some sort of fraudulent effort. And I just happened to stumble into this and sent it to the Department. Immediately, they wanted to know if they could come down and see me, and they came several times and took lengthy depositions."

In his testimony the petitioner identifies certain specific individuals (not including the claimant) as involved in these situations. In connection with

Callet's claim he refers to these incidents as "totally unrelated subjects." Nowhere in the record is there any evidence which indicates that the claimant had any connection with either of the individuals identified by the petitioner, or that he was otherwise involved in any similar situation.

The issues presented by this appeal are:

1. Whether the petitioner may protest the charges in question, and

2. If so, whether a basis for removal of the protested charges has been established.

REASONS FOR DECISION

1. THE RIGHT TO PROTEST UNDER CODE SECTION 1034

Generally speaking, under the provisions of Unemployment Insurance Code section 1034, an employer has a right to protest any item which appears on a statement of charges to his reserve account. In order to exercise this right, the employer must file a written protest with the Department within the limited time prescribed in that section. The protest must set forth the specific grounds upon which it is made.

In Bell-Brook Dairies, Inc. v. Bryant (1950), 35 Cal. 2d 404 at page 405, 218 P. 2d 1 at page 2, our Supreme Court has specifically pointed out that a protest made under (what is now) code section 1034, is not limited in scope to the mere correction of mathematical errors. The employer is afforded a means of contesting charges to his account upon any grounds which indicate that they have been improperly made. The remedies of this section, the court said, are distinct from those afforded to employers under (what are now) code sections 1326 to 1333.

This general right of protest is, however, subject to a very important limitation that is set forth in the third sentence of code section 1034 itself. It applies to every employer who has been duly notified of the filing of a benefit claim, or of a determination of the claimant's eligibility for benefits. If such an employer

thereafter fails either to file a timely benefit appeal, or to pursue such an appeal to a successful conclusion, he cannot protest a charge arising out of the claim upon the ground that the claimant was not eligible for the benefit payment. In other words, the duly notified employer must act to contest a claimant's eligibility promptly, so that benefits will not be paid out of public funds to ineligible persons, or even to potentially ineligible ones.

2. THE PROTEST BAR OF TAX DECISION NO. 2061

No mention is made in code section 1034 or elsewhere about the effect of a duly notified employer's failure to file and pursue a ruling appeal. However, in our Tax Decision No. 2061, we expressed the opinion (at page 2 of that decision) that an employer who fails to appeal a ruling within the required period of time cannot protest charges to his account resulting from benefits paid. Upon the basis of that decision, the Department contends, and the referee has held, that the petitioner cannot protest the charges in question.

In Tax Decision No. 2061 we pointed out that the opinion we expressed rested on certain statutory language in Unemployment Insurance Act section 39.1 (which in codification became part of code section 1030). In particular, we referred to that portion of act section 39.1 which stated that:

> "Appeals may be taken from said rulings in the same manner as appeals from determinations on benefit claims." (Underscoring added)

In retrospect it appears that in arriving at this opinion, we assumed that this statutory reference to the manner of appealing determinations on benefit claims was meant by the legislature to include within its scope, the effect that failing to appeal them would have upon an employer's right at a later time and in another proceeding to protest charges to his account. We apparently overlooked the fact that the manner of appealing was set forth in act section 67 (now code section 1328) while the effect of not appealing was set forth in act section 41.1 (now code section 1034).

It also appears in retrospect that this unexpressed but necessarily implicit assumption is clearly at variance with what our Supreme Court said about these two sections of the act in the Bell-Brook Dairies case supra:

> ". . . /A/lthough section 41.1 affords a means for contesting charges against an employer's account and recovering overpayments, it is distinct from the remedy provided by section 67 of the act for testing the propriety of benefit payments."

A very similar statement was also made by the Supreme Court in Matson Terminals, Inc. v. California Employment Commission (1944), 24 Cal. 2d 695 at page 701, 151 P. 2d 202 at pages 205 and 206.

From the foregoing, it is clear that the opinion we expressed in Tax Decision No. 2061 does not follow from the statutory language upon which we stated that it rested. If the result reached in that decision be correct, it must be upon other grounds than those therein expressed. This, we think, is reason enough to overrule Tax Decision No. 2061 at this time, and should the decision in this matter require it, to proceed anew to analyze the problem of the effect of an employer's failure to file and pursue a ruling appeal, upon his subsequent right in another proceeding to protest charges to his account.

3. DOES CODE SECTION 1034 BAR THE PETITIONER'S PROTEST?

First, however, let us proceed to consider what is the direct effect of the third sentence of code section 1034 upon the petitioner's stated grounds of protest. Are we precluded by the limitations of that sentence from even reviewing his protest on any of those grounds? In this respect, let us consider in order whether the petitioner was duly notified of the filing of the claim; if so, whether he took the necessary responsive steps promptly to contest the claimant's eligibility for benefits; and, if not, whether he is now protesting the charges in question upon the ground that the claimant was ineligible for the benefit payments that gave rise to them.

A. WAS THE PETITIONER DULY NOTIFIED OF THE FILING OF THE CLAIM?

In the matter at hand, the petitioner was only a base period employer of the claimant at the time of the filing of the benefit claim under which the protested charges were made. He was not also the claimant's last employer as is sometimes the case. The first notification of the filing of a claim which the code requires to be given to a base period employer who is not also a last employer is the notice of the computation of the claim provided for in code section 1329.

One of the effects of such a notification is to afford an employer an opportunity to contest the claimant's eligibility for benefits, and thereby indirectly to defeat or diminish charges to his reserve account. To avail himself of this opportunity, the employer must furnish information to the Department bearing upon the claimant's eligibility for benefits. This is done under the provisions of code section 1331.

Another effect of such a notification under code section 1329 is to afford the employer an opportunity to become entitled to a ruling under code section 1030(c). Through the medium of such a ruling, an employer's reserve account may be directly relieved under code section 1032 from certain charges arising out of the claim. To avail himself of this opportunity, the employer must furnish timely information to the Department under the provisions of code section 1030(b) in regard to the cause of termination of the claimant's employment by him.

There is also a third effect of notification under code section 1329, with which we need not concern ourselves in this matter except to mention it for the sake of completeness. An employer so notified may protest the accuracy of the computation of the claim. This is done under the provisions of code section 1330.

From the record before us, it clearly appears that the Department did mail notice of the computation of the claim to the petitioner under

the provisions of code section 1329 on April 14, 1966, and that it did not receive any response from the petitioner to that notification. The response it did receive was to the notice of recomputation that the Department sent to the petitioner about two months later on June 20, 1966. That response could be a timely submission of information only if the notice of recomputation was the first notice of the filing of the claim which the petitioner actually received.

The petitioner's testimony in regard to whether he did receive the Department's notice of April 14, 1966, and, if so, as to whether he made a timely response to that notice, is neither clear nor consistent. The truth appears to us to be contained in his reply to the referee's statement as to what the departmental records showed:

> "Yes. It's entirely possible. This is one facet of my business that Mrs. Hackett handles almost exclusively. I am not as conversant on this as I should be."

The petitioner testified at the hearing that he feels that he received all of the notices which the Department alleges it sent to him. We think the natural conclusion to be drawn from the record is that the petitioner did receive the notice of the filing of the claim which the Department mailed to him on April 14, 1966, and that he did not make a timely response to that notification. If so, he was duly notified of the filing of the claim at that time.

B. DID THE PETITIONER TAKE THE NECESSARY RESPONSIVE STEPS TO CONTEST ELIGIBILITY?

Even, however, if he did not receive this notice, the petitioner cannot contend that he was not an employer duly notified of the filing of the claim after he (admittedly) received the notice of recomputation which the Department mailed to him on June 20, 1966. Accordingly, let us assume for the moment (without holding that such was the case) that this notice of recomputation was actually the first notice of the filing of the claim which the petitioner received. In that event the information

submitted by the petitioner in response would be timely, but was it sufficient to entitle him to notice of the determination as to the claimant's eligibility for benefits in accordance with the provisions of code section 1331?

The record does not indicate that the petitioner furnished to the Department in response to the notice mailed to him on June 20, 1966 any information which might affect the claimant's eligibility for benefits. Since the petitioner was not the last employer of the claimant, the information which he did furnish as to the cause of termination of the claimant's employment by him had no disqualifying potential. It related only to the petitioner's right to receive a ruling upon the basis of which his account might be relieved of charges for benefit payments made even to an eligible claimant.

Information that the petitioner had work available for the claimant which the claimant chose not to accept might have affected the claimant's eligibility for the benefit payments that produced the charges in question. Under code section 1331, the petitioner was obligated to furnish such information to the Department promptly upon receipt of the notice of computation of the claim. Had he done so, he would have become entitled to receive a notice of determination of the claimant's eligibility, and thus he would have become entitled to appeal such a determination if it were adverse to his interests.

There is no indication in the evidence that any such information was ever furnished to the Department either in response to the notice of computation mailed to the petitioner on April 14, 1966, or in response to the notice of recomputation mailed to the petitioner on June 20, 1966, or at any other time prior to the protest of the charges in question. Under such circumstances, even if the notice of recomputation was the first notice of the filing of the claim which the petitioner received, he cannot now protest the charges in question upon the ground that he had work available for the claimant which the claimant chose not to accept. The attempt here is to state as a ground of protest that the claimant was ineligible for benefit

payments. Such a protest is precluded by the express provisions of the third sentence of code section 1034 because, in any event, the petitioner is clearly an employer duly notified of the filing of the claim, who did not contest the claimant's eligibility for benefits in due course after the receipt of such notice.

Information that union records could be checked to verify whether the claimant had been collecting or trying to collect benefits while working for others who did not report his wages might also have had an effect upon the determination of the claimant's eligibility for benefit payments that produced the charges in question. Again, there is no indication in the record now before us that the petitioner ever furnished any such information to the Department prior to his protest of these charges. Accordingly, since the petitioner was a duly notified employer, the third sentence of code section 1034 operates to preclude his right to protest on this ground to the extent that it is his purpose by this protest to show the impropriety of the charges because the claimant was ineligible for the benefit payments.

C. CAN THE PETITIONER PROTEST ON GROUNDS THAT DO NOT INVOLVE ELIGIBILITY?

There is, however, another aspect to this ground of protest. It carries within it a certain implication that the petitioner is trying to show impropriety in the charges upon the basis that an insufficient investigation was made into the claimant's eligibility for benefits. The third sentence of code section 1034 does not preclude the petitioner's right to protest the charges in question upon the basis of departmental conduct which independently of the claimant's eligibility might make it improper to charge the petitioner's account for the benefits paid.

This brings us, then, to the question as to whether the petitioner may protest the charges in question on the grounds set forth in his petition which do not involve the claimant's eligibility for benefit payments. In particular, is the petitioner precluded from making these other protests if he did not pursue his ruling denial appeal to a successful termination? If not, is

there any other reason why he is not entitled to have these protests considered and resolved on their merits?

We have already pointed out the need for analyzing the ruling appeal question anew because of the fundamental error in the reasoning in Tax Decision No. 2061. In such an analysis we may start with the basic proposition that code section 1034 affords an employer a general right to protest any item shown on the statement of charges to his account. As this is a distinct proceeding with a different purpose from other procedures provided for in the Unemployment Insurance Code, there should be no limits placed upon this general protest right except as the code may direct. Bell-Brook Dairies, Inc. v. Bryant (1950), supra, 35 Cal. 2d 404 at page 405, 218 P. 2d 1 at page 2.

The only limit that the code places on an employer's right to protest a charge is in connection with a protest that is made on the ground that the claimant was ineligible for a benefit payment. A ruling, however, even as to the cause of termination of work for a last employer (which is based upon facts having a disqualifying potential), cannot affect a claimant's eligibility for benefits. This is expressly so stated in code section 1031 in the following words:

> "No ruling made under Section 1030 may constitute a basis for the disqualification of any claimant . . . ."

This being so, the outcome of a ruling appeal can in no way involve the eligibility of a claimant for benefit payments. That question must be resolved initially by a benefit eligibility determination made by the Department, and ultimately, if necessary, by the final outcome of a benefit eligibility appeal. This is just as true in the case of a last employer as it is in the case of a base period employer who is not also a last employer even though pursuant to code section 1951, a last employer's benefit eligibility and ruling appeals are consolidated for presentation and hearing. They are consolidated because they are

based on the same termination facts. Each, however, still presents its own independent issue to be resolved:

(1) The claimant's eligibility for benefits in the case of the benefit eligibility appeal, and

(2) The employer's right to have his account relieved of chargeability for benefits paid in the case of the ruling appeal.

It is, of course, much easier to see the separate character of these two appeals when the employer involved is a base period employer who is not also a last employer of the claimant. In that situation, there is not likely to be any consolidation of appeals because the eligibility of the claimant depends upon entirely different facts from those that determine the employer's right to relief of his reserve account from chargeability for benefits paid. It is also easier in that situation to recognize that the outcome of an appeal which cannot affect a claimant's eligibility, is irrelevant in considering the question as to whether a ground of protest is barred because it is based upon the claimant's ineligibility.

It may be well to point out at this particular juncture that this irrelevance extends only to the limitation on the employer's right to protest. This does not mean that an employer's failure to file and pursue a ruling appeal is without relevance in connection with the consideration of the merits of his protest. Such a failure may have a very direct bearing upon the merits of an employer's protest, but the consideration of it for this relevant purpose should come only after clear recognition of its irrelevance in connection with any question pertaining to the employer's right to protest.

In our opinion, the limitation of the third sentence of code section 1034 on an employer's right to protest, applies only to his benefit eligibility appeal. It does not apply to his ruling appeal as well, even when these two appeals are consolidated for hearing and presentation. The outcome of the benefit eligibility appeal is

pertinent to the limitation of his protest right. The outcome of the ruling appeal is irrelevant to it.

4. THE MERITS OF THE PETITIONER'S PROTEST

We can find no other provision of the code under which an employer's failure to file and pursue a ruling appeal bars his right to protest a charge under code section 1034. Accordingly, we must hold that except for and to the extent that petitioner's grounds of protest involve the eligibility of the claimant for benefit payments, they must be fully considered and resolved on their merits in these proceedings. Those merits, however, involve the showing of some basis that justifies the removal of the protested charges.

For this purpose, a showing that the claimant in question voluntarily left his work for the petitioner without good cause is not sufficient. This ground of protest, in itself, does not establish that there was anything improper about the making of the charge. An employer's account may be properly and correctly charged for benefits paid to a claimant who actually did leave his work for the protesting employer voluntarily and without good cause.

The petitioner here was a base period employer of the claimant. Normally, in accordance with the provisions of code section 1026, the Department must charge the account of a base period employer with his proper proportion of benefits paid unless there is some authority shown for not doing so. Authority for not charging an employer's account upon the basis of the cause of termination of employment is usually found under the provisions of code section 1032.

A. ENTITLEMENT TO RELIEF FROM THE CHARGE UNDER CODE SECTION 1032

As applied to the matter at hand, code section 1032 relieves an employer's account from chargeability for benefits paid after termination of employment based on wages earned prior to termination:

(1) If it is ruled that the claimant left the employer's employ voluntarily without good cause, UNLESS:

(2) the employer failed to furnish the information specified in code section 1030

(3) within the time limit prescribed in that section.

This three-point proof is essential in order to show a right to relief from charges under code section 1032. The showing of such a right with respect to a specific charge that has been made to an employer's account establishes that the charge is improper. Its impropriety then becomes the basis for its removal under code section 1034, if it has been properly protested.

Has the petitioner established that the charges in question are improper because he was entitled to have been relieved of them under the provisions of code section 1032? The only element of the three-point proof that is clearly established is that the petitioner did furnish information of the type specified in code section 1030 to the Department. That he did so within the time limit prescribed in that section is subject to grave doubt, and the natural conclusion to be drawn from the record is that he did not.

However, we do not really need to decide this point about the timeliness of the petitioner's furnishing of information because there is still a third point to the proof which must be, and clearly has not been, shown. At no time has it ever been ruled that the claimant left the petitioner's employ voluntarily without good cause. Again, it should be noted here that the essential point is not whether the claimant did, in fact, so leave, but whether the Department has ever ruled that he so left.

In this connection, we do not yet take into account why the petitioner did not obtain the essential ruling. We will do so in due course

because it is always possible that the explanation as to why a ruling was not obtained may be reflective of impropriety in the making of a charge. Any such impropriety, however, rests upon some basis other than a right to have been relieved of the charges under the provisions of code section 1032, and its discussion at this moment would only tend to confuse the proper understanding of that right.

Accordingly, at this time, we consider only the fact that the petitioner has never obtained the essential ruling. Without it, he does not establish that he had a right to be relieved of charges under code section 1032. Without such a right, no impropriety in the making of the charge on that basis is shown.

B. ENTITLEMENT TO RELIEF FROM THE CHARGE UNDER CODE SECTION 1380

There are, of course, sections of the code other than code section 1032 under which authority may be found for not charging an employer's account with benefits paid. In this regard mention may be made of code sections 1032.5, 1335, 1338, 1380, 2603, and 3702. Examination of each of these sections, however, quickly discloses that except for code section 1380 they all relate to situations so clearly different from those raised by the petitioner in his grounds of protest as to require no further discussion.

Code section 1380, particularly its second sentence, merits some comment. That sentence states that:

> "An employer's experience rating account shall not be charged with any benefits erroneously or unlawfully paid."

A review of the history of this provision reveals that it probably has always been implicit in the charging requirements of code section 1026 and its predecessor act section 41; that only benefit payments which were correctly and lawfully made were to be so charged to an employer's reserve

account; and that erroneous or unlawful payments were not within the scope of the charging mandate. However, when act section 64 was added to the law in 1943, its provisions against the recoupment of certain overpayments might have been construed as authorizing or permitting an employer's account to be charged with them. Apparently, to avoid this, the legislature placed the following explicit proviso at the end of act section 64:

> ". . . provided further nothing herein contained shall be construed as authorizing or permitting the commission to charge to any employer's account any benefits erroneously or unlawfully paid."

Thus in connection with overpayments, the legislature made explicit a provision which we believe has always been implicit in code section 1026 and its predecessor act section 41. There is nothing in the subsequent history of the rephrasing of the above provision into its present text and its codification into code section 1380 that appears to have been intended to alter its original meaning. It is, we think, only an explicit statement in regard to problems arising out of overpayments, of what has always been implicit in code section 1026 itself in regard to any situation to which that section applies.

In order to show that a charge was improperly made because the employer was entitled to have been relieved of it under the provisions of code section 1380, the petitioner must establish that the benefits upon which the charge is based were erroneously or unlawfully paid to the claimant. Under most circumstances, proof of the claimant's ineligibility for the benefits establishes that the payment was erroneous or unlawful. However, as we have already pointed out, most employers are precluded by the third sentence of code section 1034 from protesting a charge upon the ground that the claimant was ineligible for a benefit payment.

Those employers who are not so precluded are in a position to contest the claimant's eligibility directly in a charge protest proceeding. This is

a way in which such an employer may establish that under the circumstances the benefits were erroneously or unlawfully paid to the claimant, and that accordingly, the employer was entitled to have been relieved of them. In this way, such an employer shows the impropriety of the charge which becomes the basis for its removal in these proceedings.

The petitioner, however, for reasons that we have already fully discussed, is an employer who is precluded by the third sentence of code section 1034 from protesting the charges in question upon the ground that the claimant was ineligible for the benefit payments. Accordingly, in these proceedings he cannot now initiate a question as to the claimant's eligibility for benefits as a basis for contending that the benefit payments were erroneous or unlawful. He is limited to the showing of what has already been established in regard to the claimant's eligibility by prior administrative or judicial determinations of that question.

If the petitioner were to show that the benefits which gave rise to the charges under protest were paid to a claimant whose ineligibility to receive them has been so established, he might thereby show the necessary error or unlawfulness of the payments that would entitle him to have been relieved of the charges for them under code section 1380. In this way he could show that the charges are improper. Upon such a showing he would be entitled to have them removed from his account in this proceeding.

His showing would be sufficient even if the ineligibility of the claimant was so established after the benefits were paid, and irrespective of whether or not they were ever recovered. Sometimes claimants are overpaid benefits, but under the special circumstances described in code section 1375, they are, in the interests of equity and good conscience, not required to repay them. Since, however, such benefits have been erroneously or unlawfully paid, the employer is still entitled to be relieved of chargeability for them under the provisions of the second sentence of code section 1380.

For the sake of clarity, though, we should distinguish here certain benefit payments made in accordance with code sections 1335 and 1338. These are correctly paid to the claimant, and regardless of the outcome of any further appeal, he is lawfully entitled to retain them under the first sentence of code section 1380. Since these payments are not erroneous or unlawful, they do not come within the scope of the second sentence of code section 1380, but the employer is specifically entitled to be relieved of chargeability for them under the conditions set forth in the provisions of code section 1335 or 1338.

There is no evidence in the record of the proceedings now before us of any prior administrative or judicial determination to the effect that the claimant was ineligible for the benefit payments that gave rise to the protested charges. Nor is there any evidence in this record indicating any basis other than the claimant's ineligibility which might be urged to show that the benefit payments were erroneous or unlawful. Since the petitioner is precluded from initiating any eligibility question in these proceedings, we must hold that he has not shown any right to have been relieved of the charges in question under code section 1380, and that accordingly, he has not shown any impropriety in the protested charges on that basis.

C. ENTITLEMENT TO RELIEF FROM THE CHARGE ON EQUITABLE PRINCIPLES?

There is still another basis upon which a charge to an employer's account may be found to have been improperly made. This basis should be distinguished from those which we have already discussed in which the impropriety of the charge is established by showing that the petitioner should have been relieved of it under some specific code section. This basis is one upon which the petitioner establishes his right to the removal of the charge because it is improper in accordance with equitable principles.

For example, it may happen that an employer does not receive notice of some administrative action, of which the code requires that he be

notified, because the administrative agency has omitted to send the notice to him. Through lack of such notice, the employer can lose opportunities to take timely responsive action for the protection of his reserve account. Under such circumstances, is it equitable to charge the employer's account even if the benefit payments were lawfully paid to the claimant, where the omission of the public agency in the performance of its official duty was the cause of the employer's predicament?

This depends upon whether the employer's position has been jeopardized by the omission of the required notice. If equivalent opportunities to protect his account from charges are still available to the employer in the protest of charge proceeding, no real harm has been done to him by the omission. Equity requires, however, that his opportunities at this late date be in all respects the true equivalent of those which he would have had earlier had he received proper notice.

For instance, the availability of a like procedural opportunity is not always the equitable equivalent in terms of substance. The employer's ability to present his case may have been diminished by the lapse of time. His ability to alter the course of past events is gone forever!

In this latter respect it should be noted that one of the opportunities available to an employer who has been properly notified of the filing of a claim is the opportunity, while benefits are being claimed, to offer the claimant suitable work. Such action on the part of the employer removes the claimant from the ranks of the unemployed if the claimant accepts the offer, or it removes him from the ranks of those eligible for benefits if he refuses the offer without good cause. The mere loss of this opportunity through the failure of the administrative agency to perform its official duty creates a strong equity in favor of complete removal of the protested charges from the employer's account without further showing.

At least this has been the view which the California Supreme Court has adopted in a series of 28 related cases, the lead one of which is Bell-Brook Dairies, Inc. v. Bryant (1950), supra, 35 Cal. 2d 404 at pages 407 and 408, 218 P. 2d 1 at page 3. (See also 35 Cal. 2d pages 897 through 910, 218 P. 2d pages 4 through 10.) The application of equitable principles is, of course, individual to each situation. We think, however, that the Supreme Court has clearly indicated that a failure to perform official duty which results in this type of loss of opportunity to defeat or diminish charges is, in itself, a proper basis for equitable relief by way of removal of the protested charges without further showing in regard to the claimant's entitlement to benefits.

One of the petitioner's grounds of protest in these proceedings is that he never received the referee's decision dismissing his ruling denial appeal on August 11, 1967. The implication of this protest is that by such an occurrence he was deprived of an opportunity that he might otherwise have had (through successive steps) of obtaining a ruling that would have relieved his account of the protested charges under code section 1032. The deprivation of such an opportunity through a failure in the performance of an official duty could raise a question as to the petitioner's right to relief on the basis of equitable principles.

There is, however, no evidence in the record before us that will support a finding that there was any such failure in the performance of official duty. The petitioner, himself, stated at the referee's hearing that he felt sure he had received all of the notices which the Department had alleged were sent to him. These included the referee's decision notifying the petitioner of the dismissal of his ruling denial appeal.

This evidence is in full accord with the presumptions of Evidence Code sections 641 and 664. Upon the basis of this evidence and these presumptions, we find that the referee's decision was mailed to the petitioner and received by him, and that there was no failure in the regular

performance of any official duty in connection therewith. Accordingly, the petitioner has not established entitlement to any relief in this respect upon the basis of equitable principles. General Machinery and Supply Company v. California Employment Stabilization Commission (1947), 80 Cal. App. 2d 742 at page 744, 182 P. 2d 249 at pages 249 and 250.

We have already spoken to some extent about the petitioner's protest on the ground that union records could be checked to verify whether the claimant had been collecting or trying to collect benefits while working for others who did not report his wages. We have pointed out why we are barred by the third sentence of code section 1034 from considering this protest to the extent that its purpose is to show the impropriety of the charges by contesting the eligibility of the claimant for the benefit payments. We are, however, obligated to review this protest to the extent that it attempts to show that irrespective of the claimant's eligibility for the benefit payments, it was improper on equitable principles to charge them to the petitioner's account because an insufficient investigation was made into the claimant's eligibility to receive them.

What constitutes a sufficient investigation of a claim is, of course, something that will vary in accordance with circumstances. One of these circumstances is the information in the possession of the Department, particularly the information furnished by the employer. Normally, we do not think that investigation of each claim to the extent that would be indicated by the petitioner's protest is necessary in order that it be considered sufficient.

We note from the petitioner's own testimony that when information furnished to the Department warrants intensive investigation it receives such. Apparently, however, there was nothing in the information which the petitioner furnished to the Department in connection with certain other claimants to warrant such an investigation of the

claimant, Callet. Petitioner, himself, stated that these were "totally unrelated subjects" to Callet.

Moreover, the evidence does not exclude the possibility that even Callet may have been so investigated by the Department. The protest is merely in terms that such investigation could indicate whether Callet was or was not engaged in a fraudulent practice. A basic ingredient of any proof that investigation was insufficient would be proof of the extent of investigation actually made. On this subject, the petitioner has presented no evidence at all in connection with Callet's claim. No basis, therefore, has been shown upon which the petitioner would be entitled to any kind of relief on equitable principles because of insufficient investigation of the Callet claim.

5. CONCLUSION

This means that the petitioner has not established any basis, either statutory or equitable, upon which the protested charges arising out of the Callet claim can be removed from his reserve account. For the reasons set forth above, the denial of the petitioner's protest was proper.

DECISION

The decision of the referee is affirmed.

Sacramento, California, June 25, 1970

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